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ATTORNEYS AT LAW

April 15, 2008

VIA HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Denver, Phoenix, and Minneapolis-St. Paul Metropolitan Statistical Areas, WC Docket No. 07-97.

Dear Ms. Dortch:

In accordance with the First Protective Order in the above-referenced proceeding¹, enclosed for filing are two copies of the redacted version of the attached letter being submitted by EarthLink, Inc.

Under separate cover and in accordance with the First Protective Order in this proceeding, copies of the Confidential Information are being submitted to you via courier. To the extent any party wishes to access the Confidential Information that party should email a request to Chris McCall (cmccall@harriswiltshire.com) along with executed Acknowledgments of Confidentiality associated with the First Protective Order.

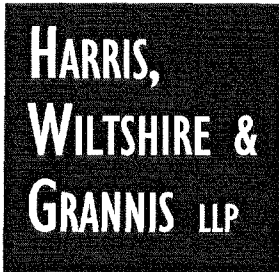
Also enclosed for filing is an extra copy of this redacted filing, please date stamp and return it to the courier. Please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata", is written over a horizontal line.

John T. Nakahata
Counsel to EarthLink, Inc.

¹ *Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Denver, Phoenix, and Minneapolis-St. Paul Metropolitan Statistical Areas, WC Docket No. 07-9, DA 07-2292, (WCB rel. June 1, 2007) ("First Protective Order").*



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Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
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***Re: Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c)
in the Seattle, Denver, Phoenix, and Minneapolis-St. Paul Metropolitan Statistical
Areas, WC Docket No. 07-97***

Dear Ms. Dortch:

In its March 5, 2008, letter, Qwest Corporation ("Qwest") provides updated data on the Seattle Metropolitan Statistical Area ("MSA") and claims that the Commission's decision in the *Verizon 6 MSA Order* adopted a market share test for measuring facilities-based competition that "depart[s] from the *ACS* and *Omaha* decisions."¹ Qwest does the same in its March 14, 2008, letter for the Minneapolis-St. Paul MSA.²

In this letter, EarthLink, Inc. and New Edge Networks ("EarthLink") makes three points in response to Qwest's claims about the Seattle and Minneapolis-St. Paul MSAs, the two MSAs at issue in which EarthLink is an active market participant. First, the Commission did not adopt a *new* market share test in the *Verizon 6 MSA Order*. The *Verizon 6 MSA Order* faithfully followed the test for forbearance set out in the *Omaha* and *Anchorage* decisions, both of which

¹ Letter from Daphne E. Butler, Qwest Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (filed Mar. 5, 2008) ("Qwest March 5 Seattle Ex Parte") (citing *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Verizon 6 MSA Order*" or "*Verizon*").

² See Letter from Daphne E. Butler, Qwest Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2, WC Docket No. 07-97 (filed Mar. 14, 2008) ("Qwest March 14 Minneapolis - St. Paul Ex Parte").

relied on a substantial market share for full facilities-based competitors in addition to requiring that 75 percent of customer locations be capable of being served within a commercially reasonable time. Second, contrary to Qwest's attempt to minimize the market share analysis, the Commission reasonably relied upon that determination as a basis for its predictions that the incumbent would have the incentives to continue to make reasonable wholesale loop offerings post-forbearance. Third, the updated data submitted by Qwest for the Seattle and Minneapolis MSAs comes nowhere near the threshold levels set in the Commission's previous forbearance decisions. That alone justifies denial of Qwest's requests for forbearance in these MSAs.

I. *Verizon, Anchorage, and Omaha All Relied on Substantial Market Share Loss to Facilities-Based Competitors In Addition to Requiring that 75% of Customer Locations Be Capable of Being Served Within a Commercially Reasonable Time.*

Qwest claims that the Commission's market share test in *Verizon 6 MSA* departed from its earlier forbearance decisions. But Qwest selectively misreads the *Omaha* and *Anchorage* orders when it states that the Commission relied not on market share but on "the presence of facilities-based competition"³ The plain fact is that the Commission analyzed and relied on both.

In *Anchorage*, the Commission made this absolutely clear: "we apply the same analytic framework to our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA. In each case, the Commission begins by examining the level of retail competition to the incumbent LEC and the role of the wholesale market. The Commission then evaluates the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought."⁴ In both cases, these were separate and independent steps in the Commission's analysis. The Commission followed this approach in the *Verizon 6 MSA Order*, looking both to Verizon's MSA-wide market share and then to the extent of coverage by facilities-based competitors.⁵

Moreover, it is clear that in analyzing the level of competition in the retail market in *Omaha*, the Commission looked primarily at the level of retail competition from the provider wholly independent of Qwest's facilities – Cox. The Commission specifically compared the

³ Qwest March 5 Seattle Ex Parte at 2.

⁴ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, Memorandum Opinion and Order*, 22 FCC Rcd 1958, 1963 (¶ 9) (2007) ("Anchorage"). See also *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415, 19447, 19451 (¶¶ 65, 69) (2005) ("Omaha").

⁵ *Verizon 6 MSA Order*, 22 FCC Rcd at 21312-13.

number of retail residential customers served by Qwest in the MSA (not the wire center) with the number served by Cox in the MSA.⁶

Only after the Commission had found a sufficient level of retail competition, which the Commission reviewed by comparing relative market shares between the ILEC and its principal facilities-based competitor, did the Commission turn to the extent of alternative facilities coverage to end user locations in the wire center.

II. Requiring a Showing That the Facilities-Based Competitor Has a Very Substantial Market Share is Reasonable in Evaluating Whether Section 10(a)'s Requirements are Met.

Qwest's argument at its core is that it does not matter whether it has 99.99 % market share or even much less market share, so long as the cable company can cover, i.e., offer "the full range of services that are substitutes for the incumbent LEC's local service offerings" to, over 75 % of customer locations within a commercially reasonable period of time.⁷ As discussed above, this is clearly not the approach taken by the Commission in *Omaha* and *Anchorage*.

The Commission's deliberate choice to consider market share as well as alternative facilities coverage was reasonable. One of the core elements on which the Commission relied in *Omaha* was its prediction that Qwest would continue to have incentives to make reasonable wholesale loop offerings available post-forbearance. The Commission made explicit the link between the market share of facilities-based providers wholly independent of the ILEC and its predictive judgment that the ILEC would in the future offer reasonable wholesale loop offerings: "The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little or no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest."⁸ In other words, Cox's high market share in the Omaha MSA was the precondition and basis for the FCC's predictive judgment that notwithstanding the lack of wholesale alternatives, Qwest would continue to make loops available at reasonable wholesale rates.

As it turns out, the Commission's predictive judgment in this regard in Omaha was incorrect, as demonstrated by McLeod's anticipated departure from the market due to the lack of loops and transport at cost-based rates.⁹ However, reducing the level of retail market share

⁶ *Omaha*, 20 FCC Rcd at 19448 (¶ 66). *Anchorage* presented a unique situation, not present here, where the incumbent cable operator was transitioning, particularly for residential customers, from use of UNE-L to its own cable plant in the areas served by cable.

⁷ *Omaha*, 20 FCC Rcd at 19444 (¶ 60); *id.* at n.156.

⁸ *Omaha*, 20 FCC Rcd at 19449 (¶ 67).

⁹ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007).

required will only serve to make it even less likely that the Commission's prediction that the ILEC will offer reasonable wholesale loop rates will come true. There is no basis for ignoring or lowering the level of actual market share loss required for forbearance, as Qwest now requests.

Nor should the market share test be applied on a wire-center basis because even substantial market share gains by competitors in individual, isolated wire centers will be unable to incent the desired wholesale market behavior by the incumbent. Indeed, the experience in the Omaha market shows that the level of market share captured by independent facilities-based competitors must be even higher than in *Omaha* to satisfy Section 10(a).

III. Forbearance Must Be Denied Because Qwest's Market Share In Seattle and Minneapolis Exceeds The Commission's Threshold.

Applying the Commission's consistent analytic framework for forbearance to this case, Qwest's requests for forbearance in the Seattle and Minneapolis MSAs must be rejected. Based on Qwest's own data, Qwest's continued dominance in these MSAs, and thus its lack of an incentive to make wholesale loops available at a reasonable rate, cannot be denied.¹⁰ Qwest reports only that it has less than a [begin confidential] [end confidential] market share in both the Seattle and Minneapolis-St. Paul MSAs,¹¹ coming nowhere near the threshold levels set in the Commission's previous forbearance decisions. That alone justifies denial of Qwest's requests for forbearance in these MSAs.

Sincerely,



John T. Nakahata

Stephanie Weiner

Counsel to EarthLink, Inc. and New Edge Networks

¹⁰ As Qwest notes, while the market share threshold remains confidential, the Commission has stated that it does not stray from dominant carrier treatment where a carrier has more than 50 percent of the market. *See Verizon 6 MSA Order*, 22 FCC Rcd at 21310.

¹¹ Qwest March 5 Seattle Ex Parte at 4; Qwest March 14 Minneapolis - St. Paul Ex Parte at 8.